

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA MANSFIELD,

Plaintiff,

1

DAWN JONES PFAFF, et al.,

Defendants.

CASE NO. C14-0948JLR

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

1. INTRODUCTION

Before the court are Defendants Dr. Jerry Palmer and Mara Stevens,¹ motion for summary judgment (Mot. (Dkt. # 113-1)), Plaintiff Pamela Mansfield's opposition thereto (Resp. (Dkt. # 119-1)), and Defendants' reply memorandum (Reply (Dkt. # 120)). This is a First Amendment retaliation case. Ms. Mansfield claims that Defendants

¹ At the time of the events in question, Ms. Stevens was known as Mara Fletcher. (See anti-SLAPP Mot. (Dkt. # 40) at 4 n.5; Stevens Decl. (Dkt. # 109) ¶ 1.) The court refers to her throughout this order by her current name—Mara Stevens or Ms. Stevens. (Stevens Decl. ¶ 1.)

1 terminated her employment as a research nurse with the University of Washington
 2 (“UW”) in retaliation for her having reported alleged improprieties in the work of Dr.
 3 Palmer’s research team. (See 3d Am. Compl. (Dkt. # 61) ¶¶ 12, 33-35; Resp. at 3-14.)
 4 She asserts that this reporting constitutes protected speech under the First Amendment.
 5 (See 3d Am. Compl. ¶¶ 33-35; Resp. at 15-17.) Defendants move for summary judgment
 6 on three principal bases: (1) Ms. Mansfield’s speech was not protected, (2) Ms.
 7 Mansfield’s speech was not a substantial or motivating factor in the decision to terminate
 8 her employment, and (3) UW would have terminated Ms. Mansfield’s employment even
 9 absent her allegedly protected speech. (See Mot. at 2, 5-6.) The court has considered the
 10 submissions of the parties, the balance of the record, and the relevant law. Being fully
 11 advised,² the court GRANTS Defendants’ motion for summary judgment and
 12 DISMISSES this case WITH PREJUDICE.

13 **II. BACKGROUND³**

14 Ms. Mansfield is a registered nurse who began working for UW in 1994. (See 3d
 15 Am. Compl. ¶¶ 1, 10; Palmer Decl. (Dkt. # 106) ¶ 4.) In 2007, she received an
 16 appointment as a research nurse on a UW diabetes study headed by Dr. Palmer (“the
 17 study”). (See 3d Am. Compl. ¶ 10; Palmer Decl. ¶¶ 2, 4.) In addition to Ms. Mansfield
 18

19 ² No party has requested oral argument, and the court deems oral argument to be
 20 unnecessary for the disposition of this motion. See Local Rules W.D. Wash. LCR 7(b)(4).

21 ³ Defendants ask the court to strike multiple documents and portions of documents that
 22 Ms. Mansfield submitted with her opposition memorandum. (Reply at 2 n.1.) Except as
 specifically discussed below, the documents and passages at issue have no impact on the court’s
 analysis, and therefore the court declines to consider Defendants’ request at this time.

1 and Dr. Palmer, the research team included an administrative assistant and research
2 coordinator named Dawn Jones-Pfaff and several other individuals. (See 3d Am. Compl.
3 ¶¶ 4, 6, 10; Palmer Decl. ¶¶ 8-9; Jones-Pfaff Decl. (Dkt. # 28) ¶¶ 1-3.) The primary
4 location of the team's work was the Veterans Administration ("VA") campus in Seattle's
5 Beacon Hill neighborhood. (See 3d Am. Compl. ¶ 10; Brooks-Worrell Decl. (Dkt. # 31)
6 ¶¶ 3-4; Palmer Decl. ¶¶ 2, 4; Palmer Decl. ¶ 4, at 11-12 ("Job Description") at 1.) As
7 such, Ms. Mansfield required a without-compensation ("WOC") appointment with the
8 VA in order to perform her job duties. (See Brooks-Worrell Decl. ¶¶ 3-4; Palmer Decl.
9 ¶ 3.)

10 Over time, certain relationships within the team soured, particularly those between
11 Ms. Mansfield and both Ms. Jones-Pfaff and Dr. Palmer. This conflict included
12 allegations regarding Ms. Mansfield's job performance and, as most relevant here,
13 allegations by Ms. Mansfield regarding Ms. Jones-Pfaff and alleged improprieties in the
14 Palmer team's research practices. (See, e.g., 3d Am. Compl. ¶ 12; Mansfield Decl. (Dkt.
15 # 117-10) 1C-1E; Brown Decl. (Dkt. # 110) ¶¶ 6, 9; Palmer Decl. ¶¶ 7-13, 16-24.)

16 Specifically, in late 2010, Ms. Mansfield began to exhibit concern regarding some
17 of the team's research practices that she viewed as unsafe, unethical, and in violation of
18 Institutional Review Board ("IRB") protocols for the study (hereinafter "IRB
19 violations"). (See Resp. at 2; Mansfield Decl. ¶¶ 1C-1D; Jacobson Decl. (Dkt. # 117-11)
20 App'x 32 ("2d Reports"), App'x 48 ("1st Report").) Ms. Mansfield reported several such
21 issues to UW's Human Subjects Division ("HSD"), a division that helps to oversee UW
22

1 research projects involving human subjects.⁴ (See 1st Report; 2d Reports at 3-4; Moe
 2 Decl. (Dkt. # 111) ¶¶ 2-4; *see also* Brown Decl. (Dkt. # 110) ¶¶ 2-3.) In November
 3 2010, Ms. Mansfield reported that Ms. Jones-Pfaff and another team member had
 4 violated informed consent and subject recruitment protocols. (See 1st Report at 1-2; *see*
 5 *also* 2d Report at 1-2; Brown Decl. ¶ 6.) Later, in December 2010, Ms. Mansfield
 6 reported that the team was using an unsafe needle size (*see* 2d Reports at 3; Brown Decl.
 7 ¶ 6, at 6-7), and in January 2011, she reported that the team was using an unsafe variety
 8 of syringe and allowing unlicensed personnel (Ms. Jones-Pfaff) to put heparin in a
 9 syringe and then use the syringe to draw blood (*see* 2d Reports at 4). In April 2011, she
 10 also reported that Ms. Jones-Pfaff attempted to admit a child for an examination at an
 11 adults-only facility. (See Brown Decl. ¶ 9; *see also* 2d Reports at 5.)

12 In her deposition testimony, Ms. Mansfield explains that her job at UW required
 13 her to report IRB violations to HSD:

14 Q: [W]as one of your job duties to ensure compliance with applicable
 15 protocols?
 16

17 ⁴ In the words of HSD Director Karen Moe, HSD's functions include "receiving and
 18 investigating complaints or reports by subjects and research participants concerning human
 19 subjects research, such as complaints of non-compliance with IRB study protocols." (Moe Decl.
 20 (Dkt. # 111) ¶¶ 2-3; *see also* Brown Decl. (Dkt. # 110) ¶¶ 2-3.) When HSD receives complaints
 21 of non-compliance with IRB study protocols, HSD determines "whether any non-compliance or
 22 violation has occurred and, if so, the severity or nature of any violation," and "provides that
 determination to the assigned IRB." (Moe Decl. ¶ 3; *see also* Brown Decl. ¶ 3.) Ms. Mansfield
 often refers to her reports to HSD as having been made to an IRB or as IRB reports (*see, e.g.*,
 Resp. at 3); however, the reports to which she cites are reports to either Dr. Palmer or to HSD
 (*see id.* at 4; Mansfield Decl. ¶¶ 1C-1D (citing 1st Report; 2d Reports); *see also* Brown Decl.
 ¶¶ 6-10 (recounting that HSD received reports from Mansfield, investigated them, and referred
 the reports and investigation materials to the relevant UW IRB committee)). Accordingly, the
 court refers to these reports as reports to HSD.

1 A: Yes, the mission of a [UW] Health and Human Services registered
2 nurse . . . are those duties.

3 Q: Including IRB protocols. Part of your job was to ensure compliance
4 with those?

5 A: Correct.

6 Q: Do you believe that you had a duty to report any IRB protocol
7 violations?

8 A: Yes.

9 Q: And that was part of your job responsibilities?

10 A: Correct.

11 . . .

12 Q: So if you weren't satisfied with the response you received by a
13 supervisor, was it your obligation to report that to, for example, [HSD]?

14 A: My duties as a registered nurse are patient safety, patient privacy,
15 validity of study outcome, and the ethical treatment. So, yes, if I report it to
16 my direct supervisor -- it was also my duty as an employee of [UW] to
17 make sure that they're aware . . .

18 Q: So part of your job, from your perspective, was to report IRB protocol
19 violations to [HSD]?

20 A: My chain of command was to report it to the principal investigator, and
21 then if I had questions, the IRB is a resource for the University and you
22 could contact them for questions as well. So, yes, in adherence to policies,
I used those departments.

Q: Was one of your responsibilities?

A: Yes, one of my responsibilities.

(See Mansfield Dep. at 44:14-46:4; *see also id.* at 116:11-16, 167:12-14, 167:20-24.) Ms.

Mansfield states that her status as a registered nurse also obligated her to report to HSD.

1 (See *id.* at 167:11-168:4, 418:10-17.) She notes, however, that her written job description
 2 did not mention a reporting obligation.⁵ (See *id.* 418:1-10; Mansfield Decl. ¶ 1.) The
 3 Director of HSD, Karen Moe, and HSD's Assistant Director for Quality and Compliance,
 4 Wendy Brown, both attest that all UW employees involved in human subject research are
 5 required to report "any ethical concern, non-compliance, or other problem" to their
 6 supervisor, and if unsatisfied with the supervisor's response, to HSD or another
 7 appropriate UW office. (Moe Decl. ¶¶ 2, 5; Brown Decl. ¶¶ 2, 4; *see also* Berntsen Decl.
 8 (Dkt. # 108) ¶ 12, at 89-98 ("Devine Dep.") at 37:2-6.)

9 Ms. Mansfield followed up on her reports to HSD with reports to the Washington
 10 State Auditor's Office ("the Auditor"). (See Mansfield Decl. ¶ 1F.) She filed a brief
 11 online report with the Auditor on February 5, 2011 (*see id.*; Jacobson Decl. App'x 46
 12 ("1st Auditor Report")), and then submitted a more detailed report on April 25, 2011 (*see*
 13 Mansfield Decl. ¶ 1F; Jacobson Decl. App'x 31 ("2d Auditor Report")). These reports
 14 cover the allegations in Ms. Mansfield's HSD reports. (*Compare* 1st Report and 2d
 15 Reports *with* 1st Auditor Report and 2d Auditor Report.)

16 _____
 17 ⁵ The written job description of Ms. Mansfield's "REGISTERED NURSE 2 –
 18 RESEARCH" position states the incumbent's primary duties. (See Job Description at 1-2;
 19 Palmer Decl. ¶ 4.) According to that description, the incumbent will, among other duties,
 20 "coordinate participation of the University's clinical center in a multi-center, international
 21 clinical study The incumbent will have responsibility for day-to-day clinical activities of
 22 the study at the University of Washington, including study and protocol development, subject
 recruitment, *ensuring participation and adherence to study protocol*, performance of tests, and
 will assist in evaluating study outcome." (Job Description at 1 (emphasis added).) In addition,
 the incumbent must have the ability to "rigidly adhere to study protocol" and "take a leadership
 position in the planning and implementation of this study, other studies, and supervising
 personnel working on these studies." (*Id.* at 2.) The incumbent must also be a registered nurse
 with a current license to practice in Washington. (*Id.*)

1 In the meantime, the conflict between Ms. Mansfield and Ms. Jones-Pfaff came to
 2 a head. On March 9, 2011, Ms. Mansfield reported to the VA that Ms. Jones-Pfaff snuck
 3 up behind her and slammed her head into a desk. (*See* 3d Am. Compl. ¶ 19.) The VA
 4 investigated the incident and, after concluding that no assault occurred, revoked Ms.
 5 Mansfield's access to its facilities. (*See id.* ¶ 20; Gladson Decl. (Dkt. # 69); Rose Decl.
 6 (Dkt. # 70); Thomas Decl. (Dkt. # 71); Berntsen Decl. ¶ 10, at 72-76 ("Keelin Report").)
 7 Shortly thereafter, UW administrators recommended that human resources ("HR")
 8 terminate Ms. Mansfield's employment on the basis that she could not perform her duties
 9 without access to the VA facilities. (*See* Stevens Decl. ¶¶ 2-4, at 6-13; Devine Dep. at
 10 38:24-39:2).)

11 Ms. Stevens, a HR manager for UW School of Medicine, affirmed the
 12 recommendation to terminate Ms. Mansfield's employment. (*See* Stevens Decl. ¶¶ 2-4,
 13 8-9, at 22; Resp. at 13-14.) Before doing so, however, Ms. Stevens set up a meeting with
 14 Ms. Mansfield, the sole purpose of which was to allow Ms. Mansfield to address the
 15 asserted reason for the termination recommendation—lack of access to VA facilities.
 16 (*See* Stevens Decl. ¶¶ 4-6, at 6-18; Resp. at 13.) Roughly forty-five minutes before that
 17 meeting was to begin, Ms. Mansfield's counsel sent an email to Ms. Stevens in which he
 18 argued that Ms. Mansfield was the victim of a retaliatory scheme by her coworkers. (*See*
 19 *id.* ¶ 7, at 19-21 ("Jacobson Email").)⁶ Counsel's email was the first time Ms. Stevens

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⁶ Ms. Mansfield's counsel appears to have attached to this email copies of Ms. Mansfield's reports to HSD and the Auditor. (*See* Jacobson Email at 1-2; Stevens Decl. ¶ 7.) In

1 had heard about Ms. Mansfield's reports of IRB violations. (Stevens Decl. ¶ 7.) Ms.
 2 Stevens states that counsel's email and its attachments were not relevant to her task at the
 3 time because they did not pertain to whether Ms. Mansfield could restore her access to
 4 VA facilities. (*See id.* ¶ 8.) Instead, because Ms. Mansfield provided no new information
 5 on that subject, Ms. Stevens terminated Ms. Mansfield's employment for lack of access
 6 to VA facilities. (*See id.* ¶¶ 8-9, at 22.)

7 On March 10, 2013, Ms. Mansfield filed this lawsuit in King County Superior
 8 Court. (State Ct. Rec. (Dkt. # 2-1) at 5.) Although her original complaint named only
 9 Ms. Jones-Pfaff (*see id.* at 5, 7), Ms. Mansfield soon amended her complaint to include
 10 the rest of the research team, Ms. Stevens, UW, and others (*see id.* at 17-27). The case
 11 was removed to this court on June 27, 2014. (Not. of Rem. (Dkt. # 1).) Since that time,
 12 court orders and voluntary dismissals have winnowed the defendants down to two—Dr.
 13 Palmer and Ms. Stevens—against whom Ms. Mansfield asserts claims under 42 U.S.C.
 14 § 1983 for First Amendment retaliation. (*See Dkt. ## 11, 46, 56, 60, 91, 103; 3d Am.
 15 Compl. ¶¶ 33-35.*) Ms. Mansfield alleges that Dr. Palmer influenced the decision to
 16 terminate her and did so in retaliation for her reports of IRB violations. (*See Resp.* at 5-
 17 13, 19-25.) In addition, Ms. Mansfield asserts that Ms. Stevens is liable for such
 18 retaliation because she affirmed the termination recommendation without investigating
 19 Ms. Mansfield's retaliation claims. (*See id.* at 22-23.)

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 21
 22 any event, Ms. Mansfield attests that she provided Ms. Stevens with those documents and
 discussed them with Ms. Stevens prior to being terminated. (*See Mansfield Decl. ¶¶ 4-4C.*)

1 On June 29, 2015, Defendants filed the instant motion for summary judgment.

2 (See Dkt. # 105; Mot.) They make three primary arguments in support of summary
3 judgment: (1) that Ms. Mansfield's reports were not protected speech; (2) that Ms.
4 Mansfield's reports were not a substantial or motivating factor in the decision to fire her;
5 and (3) that UW would have fired Ms. Mansfield even absent her allegedly protected
6 speech. (See *id.* at 2.) Defendants' motion is now before the court.

7 **III. DISCUSSION**

8 **A. Summary Judgment Standard**

9 Summary judgment is appropriate if the evidence, when viewed in the light most
10 favorable to the nonmoving party, demonstrates "that there is no genuine dispute as to
11 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.
12 P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cty. of L.A.*,
13 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing
14 there is no genuine issue of material fact and that he or she is entitled to prevail as a
15 matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden,
16 then the nonmoving party "must make a showing sufficient to establish a genuine dispute
17 of material fact regarding the existence of the essential elements of his case that he must
18 prove at trial" in order to withstand summary judgment. *Galen*, 477 F.3d at 658. A fact
19 is "material" if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*,
20 477 U.S. 242, 248 (1986). A factual dispute is "'genuine' only if there is sufficient
21 evidence for a reasonable fact finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

1 In determining whether the fact-finder could reasonably find in the nonmoving
 2 party's favor, "the court must draw all reasonable inferences in favor of the nonmoving
 3 party, and it may not make credibility determinations or weigh the evidence." *Reeves v.*
 4 *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Nevertheless, the
 5 nonmoving party "must do more than simply show that there is some metaphysical doubt
 6 as to the material facts Where the record taken as a whole could not lead a rational
 7 trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v.*
 8 *Harris*, 550 U.S. 372, 380 (2007) (internal quotation marks omitted) (quoting *Matsushita*
 9 *Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). The court may
 10 only consider admissible evidence when ruling on a motion for summary judgment. *Orr*
 11 *v. Bank of Am., NT & SA*, 285 F.3d 764, 773-75 (9th Cir. 2002). "Legal memoranda and
 12 oral argument are not evidence and do not create issues of fact capable of defeating an
 13 otherwise valid summary judgment." *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir.
 14 1982); *see also Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir.
 15 2003) ("Conclusory allegations unsupported by factual data cannot defeat summary
 16 judgment.").

17 **B. First Amendment Retaliation**

18 Ms. Mansfield claims that Defendants violated her First Amendment right to
 19 freedom of speech by contributing to the termination of her UW employment in
 20 retaliation for her reports of IRB violations. (*See* Resp. at 5-13, 19-25; 3d Am. Compl.
 21 ¶¶ 33-35.) Although a public employer may not violate the First Amendment rights of its
 22 employees, not all speech by government employees receives protection under the First

1 Amendment. *See Garcetti v. Ceballos*, 547 U.S. 410, 417-21 (2006). The Ninth Circuit
 2 employs a five-step sequential inquiry to determine whether a public employer
 3 unlawfully retaliated against an employee for engaging in protected speech. According
 4 to this approach, courts consider:

5 (1) whether the plaintiff spoke on a matter of public concern; (2) whether
 6 the plaintiff spoke as a private citizen or public employee; (3) whether the
 7 plaintiff's protected speech was a substantial or motivating factor in the
 8 adverse employment action; (4) whether the state had an adequate
 justification for treating the employee differently from other members of
 the general public; and (5) whether the state would have taken the adverse
 employment action even absent the protected speech.

9 *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). “[B]ecause these are sequential
 10 steps,” failure of the employee’s case at any step “necessarily concludes our inquiry.”
 11 *Huppert v. City of Pittsburg*, 574 F.3d 696, 703 (9th Cir. 2009), *overruled on other*
 12 *grounds by Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013). The plaintiff bears the
 13 burden to satisfy steps one through three, but the burden shifts to the defendant at steps
 14 four and five. *Eng*, 552 F.3d at 1070-72. Here, Defendants’ motion addresses only steps
 15 two, three, and five. (Mot. at 16.)

16 1. Whether Ms. Mansfield spoke as a public employee or a private citizen

17 Defendants first contend that there is no genuine dispute that Ms. Mansfield spoke
 18 as a public employee, not as a private citizen, in making her reports to HSD. (*See id.* at
 19 16-20; Reply at 2-9.) The court agrees. “‘Statements are made in the speaker’s capacity
 20 as citizen if the speaker had no official duty to make the questioned statements, or if the
 21 speech was not the product of performing the tasks the employee was paid to perform.’”

22 *Anthoine v. N. Cent. Cty. Consortium*, 605 F.3d 740, 749 (9th Cir. 2010) (quoting *Eng*,

1 552 F.3d at 1071). On the other hand, “speech which ‘owes its existence to an
 2 employee’s professional responsibilities’ is not protected by the First Amendment.”
 3 *Huppert*, 574 F.3d at 704 (quoting *Ceballos*, 547 U.S. at 421). This “inquiry into the
 4 protected status of speech presents a mixed question of fact and law.” *Posey v. Lake*
 5 *Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1130 (9th Cir. 2008).

6 To resolve this mixed question of fact and law, two inquiries are necessary.

7 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) (citing *Posey*,
 8 546 F.3d at 1129). “First, a factual determination must be made as to the ‘scope and
 9 content’ of a plaintiff’s job responsibilities.” *Id.* (citing *Eng*, 552 F.3d at 1071). This
 10 inquiry “is a practical one. Formal job descriptions often bear little resemblance to the
 11 duties an employee actually is expected to perform, and the listing of a given task in an
 12 employee’s written job description is neither necessary nor sufficient to demonstrate that
 13 conducting the task is within the scope of the employee’s professional duties for First
 14 Amendment purposes.” *Garcetti*, 547 U.S. at 424-25; *see also Johnson*, 658 F.3d at 966.
 15 “Second, the ‘ultimate constitutional significance’ of those facts must be determined as a
 16 matter of law.” *Johnson*, 658 F.3d at 966 (quoting *Eng*, 552 F.3d at 1071).

17 Here, no genuine dispute exists regarding the scope and content of Ms.
 18 Mansfield’s job responsibilities. *See id.* Ms. Mansfield’s deposition testimony shows
 19 that her job responsibilities included reporting IRB violations to her supervisor and, if her
 20 supervisor’s response was inadequate, to HSD:

21 Q: [W]as one of your job duties to ensure compliance with applicable
 22 protocols?

1 A: Yes, the mission of a [UW] Health and Human Services registered
2 nurse . . . are those duties.

3 Q: Including IRB protocols. Part of your job was to ensure compliance
4 with those?

5 A: Correct.

6 Q: Do you believe that you had a duty to report any IRB protocol
7 violations?

8 A: Yes.

9 Q: And that was part of your job responsibilities?

10 A: Correct.

11 . . .

12 Q: So if you weren't satisfied with the response you received by a
13 supervisor, was it your obligation to report that to, for example, [HSD]?

14 A: My duties as a registered nurse are patient safety, patient privacy,
15 validity of study outcome, and the ethical treatment. So, yes, if I report it to
16 my direct supervisor -- it was also my duty as an employee of [UW] to
17 make sure that they're aware . . .

18 Q: So part of your job, from your perspective, was to report IRB protocol
19 violations to [HSD]?

20 A: My chain of command was to report it to the principal investigator, and
21 then if I had questions, the IRB is a resource for the University and you
22 could contact them for questions as well. So, yes, in adherence to policies,
I used those departments.

Q: Was one of your responsibilities?

A: Yes, one of my responsibilities.

(See Mansfield Dep. at 44:14-46:4 *see also id.* at 116:11-16 ("A: [I]f I'm going to be
responsible and this is considered an IRB violation, it's my job to notify the UW that this

1 occurred. Q: You were just doing your job, is that right, in reporting this IRB violation?

2 A: Correct . . .”), 167:12-14, 167:20-24.)

3 The testimony of HSD’s Director, Karen Moe, confirms this point (*see* Moe Decl.

4 ¶ 5 (“[I]t is the responsibility and duty of each and every University employee who works
5 on or is involved with human studies research to report any ethical concern, non-
6 compliance, or other problem concerning University research with human participants.

7 University employees who become aware of such concerns are required to report them to
8 their supervisor and/or the lead researcher and if unsatisfied with his/her response, report
9 such concerns to HSD or other appropriate UW office. This was true in 2010 and 2011
10 and remains true today.”), as does the testimony of the Assistant Director for Quality and
11 Compliance at HSD, Wendy Brown (Brown Decl. ¶ 4), and the testimony of UW
12 Department of Medicine Director Donna Devine (*see* Devine Dep. at 37:2-6; Stevens
13 Decl. ¶ 4; Resp. at 13).

14 Additional confirmation comes from remarks that Ms. Mansfield made around the
15 time she was reporting alleged IRB violations to HSD. For instance, in a December 16,
16 2010, email to UW Department of Medicine HR Director Ron Boerger, Ms. Mansfield
17 wrote, “Contacting the IRB when violations occur is within my job description because I
18 am a supervisor and as a nurse, a patient advocate.” (Jacobson Decl. App’x 7 at 1; *see*
19 Boerger Decl. (Dkt. # 81) ¶ 2.) Similarly, in a July 22, 2011, email to Ms. Brown, Ms.
20 Mansfield explained that in reporting on research improprieties, she “was simply trying
21 to do my job.” (Brown Decl. ¶ 9, at 11.) The most colorful example of Ms. Mansfield
22 describing her job duties, however, comes from the email that her counsel sent to Ms.

1 Stevens just before Ms. Stevens was to meet with Ms. Mansfield to discuss the
 2 termination recommendation. In that email, Ms. Mansfield's counsel describes Ms.
 3 Mansfield as a "patient safety compliance officer" and "Veterans Admin protocol
 4 officer" who "was in charge of patient safety" and made multiple IRB reports. (Jacobson
 5 Email at 2.) The email continues, "This placed Mansfield in the uncomfortable but
 6 *assigned position* of reporting safety and health and protocol violations by Jones Pfaff
 7 and her buddies in the lab, all of whom were under Mansfield's jurisdiction as
 8 compliance officer." (*Id.* (emphasis added).)

9 Ms. Mansfield now attempts to distance herself from her previous testimony and
 10 remarks. (*See* Resp. at 3-4; Mansfield Decl. ¶¶ 1, 1C.) To that end, she has submitted a
 11 declaration in which she indicates that her nursing license required her to report the
 12 research team's alleged IRB violations but states that her job with UW "required far
 13 less." (Mansfield Decl. ¶ 1; *see* Resp. at 3.) She also states that her aim in reporting
 14 "was to implement the US HHS regulations" related to IRBs. (Mansfield Decl. ¶ 1C.)
 15 She emphasizes that her "printed job description" did not require her to make reports to
 16 anyone beyond her supervisor (*see id.* ¶ 1; *see also* Mansfield Dep. at 480:1-2), and she
 17 claims that Dr. Palmer never instructed her to do so (Mansfield Decl. ¶ 1).⁷

18 In light of her previous admissions, Ms. Mansfield's declaration is insufficient to
 19 create a genuine dispute regarding whether her job required her to report IRB violations

20
 21 ⁷ (*But see* Berntsen Decl. ¶ 13, at 99 ("Mansfield 11/8/10 email") (relating that a
 22 subordinate of Ms. Mansfield's has violated IRB rules and regulations, that Ms. Mansfield
 informed her supervisors of this, and that her supervisors "directed me [Ms. Mansfield] to go up
 the chain of command").)

1 to HSD. *See Scott*, 550 U.S. at 380; *Johnson*, 658 F.3d at 966. To begin, much of Ms.
2 Mansfield’s declaration does not undermine her earlier statements that her job required
3 her to make such reports. For example, that a professional license requires particular
4 conduct is not inconsistent with a job requiring the same conduct. (*See* Mansfield Decl.
5 ¶ 1; Resp. at 3); *Cicchiello v. Beard*, 726 F. Supp. 2d 522, 530 (M.D. Pa. 2010)
6 (“Plaintiff does not dispute that as part of both her job duties as well as her nurse
7 licensing requirements, it was her responsibility to report nursing violations to her
8 employer.”). Nor is the absence of an explicit requirement in a written job description
9 necessarily inconsistent with the existence of such a requirement. *See Garcetti*, 547 U.S.
10 424-25 (“Formal job descriptions often bear little resemblance to the duties an employee
11 actually is expected to perform, and the listing of a given task in an employee’s written
12 job description is neither necessary nor sufficient to demonstrate that conducting the task
13 is within the scope of the employee’s professional duties for First Amendment
14 purposes.”); *see also Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d
15 196, 202-03 (2d Cir. 2010) (“[S]peech that government employers have not expressly
16 required may still be ‘pursuant to official duties,’ so long as the speech is in furtherance
17 of such duties.”) (citing *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006)); (Job
18 Description at 1 (listing among the incumbent’s responsibilities “ensuring . . . adherence
19 to study protocol”)).

20 Furthermore, the court does not consider Ms. Mansfield’s declaration to the extent
21 it contradicts her earlier testimony. “The general rule in the Ninth Circuit is that a party
22 cannot create an issue of fact by an affidavit contradicting his prior deposition

1 testimony.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009). To
 2 apply this rule, the court must first “make a factual determination that the contradiction
 3 was actually a ‘sham.’” *Id.* Second, “the inconsistency between a party’s deposition
 4 testimony and subsequent affidavit must be clear and unambiguous” *Id.* at 998-99.
 5 Therefore, the “non-moving party is not precluded from elaborating upon, explaining or
 6 clarifying prior testimony elicited by opposing counsel on deposition and minor
 7 inconsistencies that result from an honest discrepancy, a mistake, or newly discovered
 8 evidence afford no basis for excluding an opposition affidavit.” *Id.* (internal punctuation
 9 omitted) (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir. 1995)).

10 The court finds that Ms. Mansfield’s declaration constitutes a sham insofar as it
 11 implies that her job at UW did not require her to report IRB violations to anyone but Dr.
 12 Palmer. In paragraph one of her declaration, Ms. Mansfield describes her independent
 13 duty as a nurse to look out for patient safety. (Mansfield Decl. ¶ 1.) She then states that
 14 her UW assignment required “far less” of her, and that neither her written job description
 15 nor her instructions from Dr. Palmer required her to report patient-safety issues. (*Id.*)
 16 The implication of this paragraph is that her position at UW did not require her to report
 17 IRB violations to anyone beyond Dr. Palmer. (*See id.; see also id. ¶ 1C; Resp. at 3.*)
 18 This is not a minor inconsistency or clarifying information. Rather Ms. Mansfield states
 19 in her deposition that reporting to HSD was her “duty as an employee of [UW]”
 20 (Mansfield Dep. at 44:22-45:18), and then implies in her declaration that her job at UW
 21 imposed no obligation to make such reports (*see Mansfield Decl. ¶ 1; see also id. ¶ 1C;*
 22 *Resp. at 3*). The distinction between the two is clear and unambiguous. *See VanAsdale*,

1 577 F.3d at 998-99. Ms. Mansfield's declaration, however, offers no explanation as to
 2 why she has changed her story.⁸ (See Mansfield Decl.) Moreover, the remainder of the
 3 record, including Ms. Mansfield's statements from 2010 and 2011, supports her
 4 deposition testimony.⁹

5 The court therefore concludes that no genuine dispute exists regarding the scope
 6 and content of Ms. Mansfield's job duties. *See Johnson*, 658 F.3d at 966. On the record
 7 before the court, no reasonable jury could find that Ms. Mansfield's job duties did not
 8 include reporting IRB violations to HSD. *See Scott*, 550 U.S. at 380; *Galen*, 477 F.3d at
 9 658; *VanAsdale*, 577 F.3d at 998-99.

10 Next, the court considers the legal question of whether Ms. Mansfield made the
 11 reports at issue here pursuant to her job duties. *See Johnson*, 658 F.3d at 966. The court
 12 answers that question in the affirmative and therefore concludes that Ms. Mansfield's
 13 reports to HSD receive no protection under the First Amendment. *See Huppert*, 574 F.3d
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15 ⁸ Ms. Mansfield's opposition brief suggests that Ms. Mansfield was referring to her
 16 licensing obligations when she seemed to be talking about her job at UW. (Resp. at 3
 17 ("Mansfield used the words 'job' and 'responsibility' Mansfield [sic] when discussing her
 18 'mission' and RN licensing obligations. But Mansfield viewed her assigned UW duties
 19 differently than she viewed her responsibilities.").) Yet Ms. Mansfield does not state in her
 20 declaration that she misspoke during her deposition. *See Estrella*, 682 F.2d at 819-20 ("Legal
 21 memoranda and oral argument are not evidence and do not create issues of fact capable of
 22 defeating an otherwise valid summary judgment."). Moreover, neither her brief nor her
 declaration even attempts to explain her use of the phrase "duty as an employee of the University
 of Washington" in connection with her reporting to HSD. (Mansfield Dep. at 44:22-45:18; *see*
 Resp.; Mansfield Decl.)

23 ⁹ Although Ms. Mansfield specifically singles out as disputed one aspect of the
 24 declaration of Ms. Moe, Ms. Mansfield does not challenge Ms. Moe's and Ms. Brown's
 25 assertions that all UW employees involved with human subjects research have a duty to report
 26 concerns to their supervisors and, if the response proves inadequate, to HSD or another
 27 appropriate UW office. (See Moe Decl. ¶ 5; Brown Decl. ¶ 4; Resp.)

1 at 703, *overruled on other grounds by Dahlia*, 735 F.3d 1060. Ms. Mansfield did not
2 speak as a private citizen when she reported her concerns to HSD. Rather she wrote
3 emails from her work address, largely during work hours, and to another division of UW
4 that oversees studies of the kind with which she was involved and in which she had a
5 leadership role. (See 1st Report; 2d Reports; Moe Decl. ¶¶ 3-5; Job Description at 1-2;
6 Jacobson Email at 2); *Freitag*, 468 F.3d at 546 (concluding that a prison guard's report to
7 the director of the state department of corrections regarding inmate misconduct and
8 failure of superiors to respond was submitted "pursuant to [plaintiff's] official duties" and
9 thus not constitutionally protected); *Coomes v. Edmonds Sch. Dist. No. 15*, No. C12-
10 0319-JCC, 2013 WL 3294393, at *5-6 (W.D. Wash. June 28, 2013) (holding that
11 plaintiff-teacher spoke pursuant to her official duties in communications to school and
12 district administrators because she used her school email account, sent a number of
13 communications during school hours, and "was expressing her professional opinions
14 about the appropriate management of a program in which she played a leadership role").
15 Further, as detailed above, Ms. Mansfield admits that she had a duty as a UW employee
16 to make such reports and that she made reports as part of her job. (See Mansfield Dep. at
17 44:14-46:4; see also id. at 116:11-16, 167:12-14, 167:20-24; Jacobson Decl. App'x 7 at
18 1; Brown Decl. ¶ 9, at 11; Jacobson Email at 2.)

19 Ms. Mansfield argues that she spoke as a private citizen because she reported to an
20 organization "outside the UW chain of command" and because her nursing license
21 obligated her to act as she did. (See Resp. at 3-4; 15-17.) Regarding the first argument,
22 the record contains no support for Ms. Mansfield's conclusory assertion she reported

1 “outside [her] UW chain of command.” (Resp. at 17-18.) Rather, uncontested statements
 2 in the declarations of Ms. Moe and Ms. Brown show that HSD is a division of UW that
 3 oversees UW research involving human subjects and receives compulsory complaints and
 4 reports about such research. (See Moe Decl. ¶¶ 3-5; Brown ¶¶ 3-4.) Furthermore, Ms.
 5 Mansfield herself has characterized HSD as part of her chain of command. (Mansfield
 6 Dep. at 45:11-46:4 (“Q: So if you weren’t satisfied with the response you received by a
 7 supervisor, was it your obligation to report that to, for example, [HSD]? Q: So, yes,
 8 if I report it to my direct supervisor – it was also my duty as an employee of [UW] to
 9 make sure that they’re aware Q: So part of your job, from your perspective, was to
 10 report IRB protocol violations to [HSD]? A: My chain of command is to report it to the
 11 principal investigator, and then if I had questions, the IRB is a resource for the University
 12 and you could contact them as well. So, yes, in adherence to policies, I used those
 13 departments. Q: Was one of your responsibilities? A: Yes.”).)¹⁰

14 Ms. Mansfield’s second argument fares no better. Although the record indicates
 15 that Ms. Mansfield spoke not just as a UW employee but also as a nurse (see Mansfield
 16 Dep. at 167:11-168:4, 418:10-17; Mansfield Decl. ¶ 1), her additional motivation does
 17 not detract from the conclusion that she spoke as a public employee. *See Garcetti*, 547
 18 U.S. at 421 (“It is immaterial whether [the plaintiff] experienced some personal

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 21 ¹⁰ In addition, whether a report is made outside the employee’s chain of command is a
 22 relevant but not dispositive consideration. *See Dahlia*, 735 F.3d at 1074. This consideration is
 particularly relevant in “a highly hierarchical employment setting such as law enforcement,” *id.*;
 however, Ms. Mansfield has presented no evidence or argument that she worked in such a
 setting.

1 gratification from writing the memo; The significant point is that the memo was
2 written pursuant to [the plaintiff's] official duties."); *Cicchiello*, 726 F. Supp. 2d at 530
3 ("Plaintiff does not dispute that as part of both her job duties as well as her nurse
4 licensing requirements, it was her responsibility to report nursing violations to her
5 employer. Because Plaintiff" expressions were made in her capacity as a registered
6 nurse, her speech . . . does not enjoy First Amendment protection."); (*see also* Job
7 Description at 2 (requiring the incumbent to possess a valid nursing license).)
8 Accordingly, the court concludes that Ms. Mansfield reported to HSD in her capacity as a
9 public employee. *See Johnson*, 658 F.3d at 966; *Freitag*, 468 F.3d at 546.

10 Ms. Mansfield's reports to the Auditor, however, are another matter. As noted
11 above, Ms. Mansfield made a preliminary report to the Auditor on February 5, 2011, and
12 a more detailed report on April 24, 2011. (*See* 1st Auditor Report; 2d Auditor Report.)
13 The "right to complain . . . to an independent state agency is guaranteed to any citizen in
14 a democratic society regardless of his status as a public employee." *Freitag*, 468 F.3d at
15 545 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Moreover, Defendants
16 do not appear to contest that Ms. Mansfield had no official duty to report her concerns to
17 the Auditor (*see* Reply at 2-10), and nothing in the record indicates that she had such a
18 duty. The court therefore finds that Ms. Mansfield spoke as a private citizen when she
19 made her reports to the Auditor. *See Freitag*, 468 F.3d at 545.

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1 2. Whether Ms. Mansfield's speech was a substantial or motivating factor in her
2 termination

3 Nevertheless, Ms. Mansfield's retaliation claim fails because she cannot show that
4 her reports to the Auditor were "a substantial or motivating factor in the adverse
5 employment action." *Eng*, 552 F.3d at 1071. "As a threshold matter, to establish a
6 genuine and material dispute as to whether the speech was a substantial or motivating
7 factor in the adverse action, the plaintiff must first provide evidence indicating that the
8 defendant was aware of the plaintiff's expressive conduct." *Marr v. Anderson*, 611 F.
9 Supp. 2d 1130, 1142 (D. Nev. 2009) (citing *Alpha Energy Savers v. Hansen*, 381 F.3d
9 917, 929 (9th Cir. 2004)); *see also Keyser v. Sacramento City Unified Sch. Dist.*, 265
10 F.3d 741, 750-51 (9th Cir. 2001); *Rohrbough v. Univ. of Col. Hosp. Auth.*, 596 F.3d 741,
11 750 (10th Cir. 2010).

12 Ms. Mansfield points to no evidence showing that Dr. Palmer knew about her
13 reports to the Auditor. *See id.* Dr. Palmer denies knowing of those reports during the
14 relevant time period. (*See* Palmer Decl. ¶¶ 28-29.) In the face of that denial, Ms.
15 Mansfield offers her declaration, in which she claims that Dr. Palmer "knew the process
16 [with the Auditor] had started." (Mansfield Decl. ¶ 1F.) Her only evidence in support of
17 this claim, however, is a pair of emails that do not show that Dr. Palmer knew about her
18 reports to the Auditor. The first email is a December 16, 2010, communication from Ms.
19 Mansfield to Mr. Boerger, in which she states, "I am a . . . whistleblower. On 11/4/10, I
20 informed Dr. Palmer . . . of IRB violations made by Dawn Jones Pfaff. . . . When Dr.
21 Palmer did not report the violations to the IRB, I contacted Wendy Brown"

1 (Jacobson Decl. App'x 7 at 1.) The second is a March 7, 2011, email from Mr. Boerger
 2 to Dr. Palmer, wherein Mr. Boerger references his mid-December exchange with Ms.
 3 Mansfield and explains that “Ms. Mansfield indicated her intent to contact the UW
 4 Ombudsman’s office.” (*Id.* App'x 52 at 2.)

5 Nothing in these emails suggests that Dr. Palmer knew about Ms. Mansfield’s
 6 reports to the Auditor. In fact, no mention of the Auditor appears in either email. (*See*
 7 Jacobson Decl. App'x 7, 52.) Ms. Mansfield refers to herself as a “whistleblower” in the
 8 first email; however, she connects that statement to her reports to Dr. Palmer and HSD,
 9 not to the Auditor. (*See id.* App'x 7.) Indeed, she sent the first email two months before
 10 filing her first report with the Auditor. (*See id.*; 1st Auditor Report.) In the second email,
 11 Mr. Boerger does not use the word “whistleblower” and states only that Ms. Mansfield
 12 intended to contact another UW office, not the Auditor.¹¹ (*See* Jacobson Decl. App'x
 13 52.) Ms. Mansfield did not file her second report with the Auditor until more than a
 14 month after Mr. Boerger’s email to Dr. Palmer. (*See id.*; 2d Auditor Report.) Thus,
 15 because Ms. Mansfield offers no evidence to show that Dr. Palmer knew of her reports to
 16 the Auditor,¹² her claim against Dr. Palmer must fail. *See Marr*, 611 F. Supp. 2d at 1142
 17 (citing *Alpha Energy Savers*, 381 F.3d at 929); *see also Keyser*, 265 F.3d at 750-51;
 18 *Rohrbough*, 596 F.3d at 750.

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 21 ¹¹ Ms. Mansfield points to no evidence that she ever contacted the UW Ombudsman, or
 22 that Dr. Palmer took action against her because she intended to do so.

¹² The court STRIKES Ms. Mansfield’s statements regarding Dr. Palmer’s knowledge of
 her reports to the Auditor for lack of foundation. *See* Fed. R. Evid. 602; (Mansfield Decl. ¶ 1F.)

1 3. Whether Ms. Stevens may be liable on a theory of imputed retaliation

2 Ms. Mansfield's claim against Ms. Stevens likewise cannot survive. That claim
 3 relies on the theory that Dr. Palmer's retaliation should be imputed to Ms. Stevens
 4 because Ms. Stevens was legally required to investigate Dr. Palmer's alleged retaliation
 5 before terminating Ms. Mansfield but failed to do so.¹³ (*See* Resp. at 22-23 (citing
 6 *Poland v. Chertoff*, 494 F.3d 1174, 1182-83 (9th Cir. 2007); *Johnson v. Duffy*, 588 F.2d
 7 740, 743-44 (9th Cir. 1978)).) The foregoing analysis and conclusions foreclose imputed
 8 liability here. A plaintiff may impute retaliation to a superior only if the plaintiff first
 9 demonstrates underlying intentional retaliation by a subordinate. *See Marr*, 611 F. Supp.
 10 2d at 1145-46 (citing *Poland*, 494 F.3d at 1182). As discussed above, however, Ms.
 11 Mansfield fails to show that Dr. Palmer intentionally retaliated against her. *See supra*
 12 Parts III.B.1-2. Accordingly, no liability exists to impute to Ms. Stevens, and so the
 13 claim against Ms. Stevens must fail. *See Marr*, 611 F. Supp. 2d at 1145-46 (citing
 14 *Poland*, 494 F.3d at 1182).

15 In sum, no genuine dispute of material fact exists and Defendants are entitled to
 16 judgment as a matter of law on three bases: (1) Ms. Mansfield spoke as a public
 17 employee when she reported alleged IRB violations to HSD; (2) Dr. Palmer did not know
 18 about Ms. Mansfield's reports to the Auditor during the relevant time period; and (3) Ms.

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 21 ¹³ Ms. Mansfield does not contest Defendants' assertion that Ms. Stevens did not
 22 intentionally retaliate against Ms. Mansfield. (*See* Resp. at 22-23; *see also* Resp.) Thus, the
 22 court agrees with Defendants that there is no genuine dispute that Ms. Stevens did not
 22 intentionally retaliate against Ms. Mansfield. *See* Fed. R. Civ. P. 56(c), (e); *Galen*, 477 F.3d at
 22 658; (Mot. at 24-25; Reply at 12-13.)

1 Stevens cannot be liable under a theory of imputed retaliation because Ms. Mansfield
2 fails to show underlying intentional retaliation. The court therefore grants summary
3 judgment on Ms. Mansfield's First Amendment claims against Dr. Palmer and Ms.
4 Stevens. Finally, given that these claims are Ms. Mansfield's sole remaining claims, the
5 court dismisses this case with prejudice.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the court GRANTS Defendants' motion for summary
8 judgment (Dkt. ## 105, 113-1) and DISMISSES this case WITH PREJUDICE.

9 Dated this 1st day of September, 2015.

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13 JAMES L. ROBART
United States District Judge
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